No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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WILLIAM MORRIS,

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UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the United States of America, appellee in the above entitled cause, and presents this, its Petition for Rehearing of the above entitled cause, and in support thereof respectfully shows:

Statement of Grounds for Rehearing.

That the opinion of this Honorable Court, reversing the judgment of conviction in the above entitled case,

(1) Misconstrues the Instructions given the jury by the trial court;

(2) Disregards the fact that the Court instructed the jury upon all elements of the crime charged;

(3) Misconstrues the holding of cases cited as authority for reversal;

(4) Disregards entirely the rule that error must be prejudicial before a conviction will be reversed;

(5) Ignores the fact that the point upon which the Court reversed the conviction was never raised in the trial court, and that although the trial judge particularly invited counsel to indicate any dissatisfaction, Appellant did not direct the attention of the trial judge to the purported source of error;

(6) Ignores the fact that although an exception was taken to certain Instructions, no exception was taken to the particular Instruction upon which the Court bases its reversal;

(7) Ignores the fact that further Instructions defining the crime alleged were not requested by Appellant;

(8) Reverses the conviction of a man, plainly guilty, because of the form of an Instruction although the substance of the Instruction was complete and correct.

Questions of Law.

(1) Did the District Judge commit error in the Instruction wherein he charged the jury on the elements of the crime charged?

(2) If the District Judge did commit error in giving said Instruction, was the error reversible, in the absence of the taking of an Exception at the trial; and under the circumstance that Appellant did not request either amplification of the Instruction or that it be cast in another form or that some additional instruction be given?

The questions will be considered under the following headings:

(1) The District Court Adequately and in Proper Form Instructed the Jury as to the Elements of the Offense Charged.

(2) If There Is Formal Error in the Record, It Is Not Reversible Error.

ARGUMENT.

The District Court Adequately and in Proper Form Instructed the Jury as to the Elements of the Offense Charged.

(A) The Instruction in Question Is in Harmony With the Authorities Cited in the Majority Opinion.

The footnote on page 6 of the Opinion refers to several cases, none of which condemn the type of Instruction given and some of which infer it to be a proper style of Instruction as a vehicle for defining the crime charged.

Bird v. United States, 180 U. S. 356, is cited in the Opinion as support for this statement.

> "An instruction which does not state any proposition of law, or only states the result of the law's application, is erroneous."

This language does not appear in the case. The Court in its Opinion did not condemn the so-called formula type of Instruction. The only definition of the crime charged in the *Bird* case was given in such an instruction.[1] Reversal occurred, not because the law was stated to the jury only in a hypothetical proposition, but because a proper element of the law was omitted.

The questioned Instruction reads thus:

> " 'The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the de-

---

[1]*Bird v. United States,* 180 U. S. 356 at p. 362: "As the trial judge allowed and signed a bill of exceptions to his instruction in this behalf, it cannot be fairly presumed that the error was healed by any modification or correction in some other and undisclosed part of his charge."

fendant Homer Bird, on the 27th day of September, 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment.' "

"The bill of exceptions shows that to 'this instruction the defendant then and there excepted for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defence of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty.' "

The Supreme Court had the challenged Instruction before it as the only Instruction on the subject. The Bill of Exceptions contained no other Instruction. The Court declined to presume that "the error was healed by any modification or correction made in some other undisclosed part of his charge."

The crime charged was murder. The statutes defining murder and its included lesser offenses are brief (as compared to about two printed pages in this case).

Had the Court felt statutory language or a condensation thereof the necessary style of the charge the Opinion would have so stated, for the case was remanded for a new trial. When and if the new trial was had the District Court was without any hint from the reversing Court

that it should read or summarize the statute. Instead it was told by the Supreme Court that the formula Instruction given the jury was incomplete because it did not contain the following language, which was designed to enlarge, not statutory language, but the language of the formula Instruction:

> "* * * if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty."

The comment of the Supreme Court on this omission reads as follows:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal."

It is apparent, on a full study of the case, that the Supreme Court directed its criticism to a matter of content and not of form or style; and it appears from the following language that the Court understood the formula to be an Instruction of law, and an explanation of law, not an invasion of the function of the jury.

> "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Had the omitted matter been included the "chief object" of an instruction would have been fulfilled and would have

made the charge good for it would have served to "point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

We have treated this decision at length because:

1. The case is one of two Supreme Court cases cited in the majority opinion;

2. It is axiomatic that when an Appellate Court indicates that a particular Instruction should be given, and remands for a new trial because it was not given, that the Trial Court will give it in the form indicated on the new trial. We assume that the Supreme Court in thus directing the amendment, would have directed the reading or mere summarization of the statute prohibiting murder, had it felt such an Instruction necessary, for no such Instruction had been given before. Instead, the higher Court ruled that the offered amendment should have been added to the Instruction, thereby clearly indicating that such an Instruction, if it includes all the elements, is an Instruction defining the law applicable and that the Instruction was capable of amendment in its formula style, rather than a form to be discarded in favor of a reading of a bare definition cast in statutory or textbook language.

In *Screws v. United States,* 325 U. S. 91, also cited in the majority opinion, the Opinion omits the text of the Instruction. It does point out that the Court should have charged that the acts allegedly done were done "wilfully" whereas the Instruction used the word "illegally."

In the case before this Court it has never been suggested either in counsel's brief or in the majority opinion, that any element of the crime was omitted from the Instruc-

tion; or that a false element has been added to it. The complaint appears to be that

> "The jury was never given an explanation or definition or enacted text of the offense charged, but instead were told that if they found certain enumerated facts, the verdict must be one of guilty; otherwise the verdict must be one of not guilty."

The *Screws* case lends no aid to either the theory of the majority of the Court or the theory adopted by the Trial Judge. It is not in point for it deals only with the giving of an Instruction which gave the jury a false standard. The majority opinion in the present case in effect says that the Trial Court did not give the jury any definition of the crime, citing for that the ruling the *Screws* case and the *Bird* case, although the *Bird* case holds that the giving of a complete formula is a satisfactory statement of the law defining the crime. The *Bird* case in criticizing the substance of Instructions not only did not criticize the "formula" method of explaining the law, but sent the case back for a new trial with errors of substance in the formula corrected.

Corson v. United States, 147 F. (2d) 437, also cited, does not assist in this problem. There was no formula Instruction there. The question concerned inadequacy of an Instruction because of omission of a matter of substance rather than a question of form. In *Christensen v. United States,* 90 F. (2d) 152, the Opinion does not reveal the style of the Instruction, but reverses because of a substantive lack. *Kreiner v. United States,* 11 F. (2d) 722, deals with character Instructions and does not touch the point involved in this appeal. *United States v. Harris,* 45 F. (2d) 690, holds that "the court should be astute to see that the charge advised the jury of all the essential

elements of the crime." The element "knowingly" was omitted. *Allen v. Roydhouse,* 232 Fed. 1010, is a civil case and deals with segregation of matters of fact from matters of law.

The only comment *re* Instructions in *Massee v. Williams,* 207 Fed. 222, appears to be "It was the court's duty to charge the law arising upon the facts as applicable to such facts so as to aid the jury in arriving at a correct conclusion."

Sections 1189-1190, Corpus Juris Secundum, cited in the majority opinion, contain a great deal of text as to what instructions must contain. They do not contain any statement that the style in which the jury is instructed must be such as to include the reading of the statute or a textbook-like digest thereof.

People v. Fox, 185 Pac. 211, is cited in the note to Section 1189 and as authority for that portion of the section which reads:

> "as a general rule, it is the duty of the trial court to instruct the jury distinctly and precisely on the law of the case."

In *People v. Fox* the defendant was convicted of embezzlement. In affirming the judgment it was said:

> "It was the duty of the court 'in charging the jury' to state to them all matters of law necessary for their information. Section 1127, Penal Code. The instruction complained of was a correct statement of the law and clearly applicable to the theory of the prosecution. * * *"

The Instruction referred to defined the crime by giving the jury a formula as follows:

> "If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date

> charged in the information, fraudulently appropriate the moneys of Mrs. Anna G. Walters after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information."

Note that the jury in the *Fox* case was told that if they found certain enumerated facts, the verdict must be one of guilty.

This is the claimed fault with the Instruction in this case. The majority opinion states, "a jury's duty cannot be so limited by a judge." However, in the *Fox* case the District Court of Appeal stated, "The instruction complained of was a correct statement of the law. * * *"

> "Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. There can never be applied to a charge under such circumstances the canons of criticism to which a treatise on the law of the case could properly be subjected. * * *"
>
> *United States v. Stilson,* 254 Fed. 120, at 125.

People v. Leddy, 95 Cal. App. 659, 273 Pac. 110, considers and approves a similarly styled Instruction.

(B) The Jury Would Not Have Been Better Informed Had the Court Read the Statute and Regulation.

The trial Judge fully advised the jury that it was the sole judge of the facts [R. 94-95] and that his Instructions were the law [R. 94-95-96].

Had he elected to read the statute and regulation under which the information was drawn, his Instructions would have become lengthy beyond the ability of a juror to readily remember.

Recourse would have become necessary in the jury room to the written Instructions. Questions of statutory interpretation would easily have arisen in the discussions of the jurors.

Such Instructions are not favored. The Supreme Court of California in *People v. Albertson,* 23 Cal. (2d) 550, 145 P. (2d) 7 (1944), declared:

> "An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court * * * (citations). It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the Court."

The statute and regulations applicable, in their pertinent portions, provide:

Sections 202 and 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U. S. C. App. 901 *et seq.*), provide in part:

Section 202 (50 U. S. C. App. 922):

"Investigations, records; reports

* * * * * * * *

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmation and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

(202b)

Section 205(b) (50 U. S. C. App. 925):

"Enforcement

* * * * * * * *

"(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (section 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not

more than two years in the case of a violation of section 4(c) (section 904(c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Maximum Price Regulation 292, as amended, Sections 1351, 1414 (8 Fed. Reg. 135 and 543 (G)).

"(g) Every intermediate seller selling citrus fruits shall:

"(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item."

* * * * * * * *

"§1351.1414" Definition. (a) When used in this regulation, the term:

* * * * * * * *

"(5) 'Records' includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading and other papers and documents."

It is the first duty of the Court in charging the jury to see that all elements of the offense are brought before

the jury in understandable form. As is apparent from a study of the cited cases, the great peril is that some element will be incorrectly stated, or left out, or written into the Instruction although it does not exist in the statute. Similar peril is present in undertaking to summarize statutes and long regulations such as are involved in this case. To reduce the case to an understandable formula is simpler than to condense statutory language. It results in a rule which jurors can readily comprehend. If done without comment within the formula, it is impossible for a juror to know the Judge's view of the evidence.

Modern Courts, in the cited cases, have held the giving of the formula to be an Instruction of law.

Each element, necessary to support guilt, was carefully stated in the formula. Had the jury digested the statute and regulation, it would have found that several questions would have to be answered in its inquiry as to whether an offense had been committed. It has not been suggested in Appellant's brief, or in the majority opinion, that such questions would properly be any different than the ones set forth in the Court's Instruction. It is certainly more conducive to proper verdicts to have the Court determine the essential elements of a crime and state them simply, than for jurors to embark on analysis of statutes which are of even moderate complexity.

We have not found any case which holds that such an Instruction is not an Instruction of law. The cases herein discussed hold that it is such an Instruction. This method of Instruction is not novel. It appears to have survived from early in our jurisprudence without inciting the development of any case law against it.

If There Is Formal Error in the Record It Is Not Reversible Error.

Had the Court instructed the jury by reading of the statute and regulations it would not have provided the jury with any additional properly useful law than was given it in the charge. As stated in the dissenting Opinion:

> "It is obvious that if Morris had committed the acts described in the hypothetical alternative in the charge so challenged alone by the court, he was in fact guilty. Hence there was no 'miscarriage of justice' and no occasion for a *sua sponte* consideration of the instruction."

Courts have consistently refused to reverse upon questions of substantial impairment of constitutional rights because such questions were not seasonably raised. This Court applied the rule in *Rose v. United States,* 149 F. (2d) 755 (C. C. A. 9), where for the purpose of making its ruling the Court assumed a search and seizure illegal but declined to consider the point on appeal because it had not been raised at a timely point in the proceedings in the Court below. It seems consistent that a jurisdiction which places such a limitation upon the raising of a point of constitutional right infringement would hold that an acquiescence in the Instruction in the Trial Court cannot be a basis for a reversal when raised for the first time in the Appeal Court, particularly when the matter concerns one of style and form rather than one of substance. Had the defendant desired that the regulations be read or summarized, his request would have been for the simplest kind of action in that the Court could merely read the verbose language without any problem of composing an Instruction. It is noted that after Appellant's counsel had

stated that there were no exceptions to the Instructions the Court invited counsel to approach the bench [R. 102] and stated:

> "The Court: 'Just because you haven't been in the Federal Courts, I wondered if you intended to offer any objections to the instructions offered, because those exceptions you must make at this time.'
>
> "Mr. Leake: 'Yes, your Honor.'
>
> "The Court: 'Well, you will have to make them in open court as to each of the instructions.'
>
> "Mr. Leake: 'Thank you very much.'
>
> "(Thereupon, the following proceedings were had within the hearing of the jury.)
>
> "The Court: 'I think counsel possibly misunderstood my statements about exceptions to the instructions given. I should have said instructions refused. We use that phrase, but we mean that it is to apply to those refused also, and for that reason I will ask now if counsel for either side have any exceptions to [39] any of the instructions proffered by them and not given by the court?'
>
> "'I will explain to the jury that counsel are required to present their views on the law to the court, and the court either adopts them, modifies them, or rejects them, and counsel are also required to indicate to the court before the jury retires any exceptions they may have to those instructions. It is the only place in the record they can show their dissatisfaction in order to state it later on in a higher court.'
>
> "'All right.'
>
> "Mr. Leake: 'Shall I refer to them by number?'
>
> "The Court: 'Yes, I know what they consist of.'"

Thereafter counsel did take exception to certain failures to charge but did not except to the Instruction defining the crime. He did not at any time offer an Instruction on this subject. In *Boyd v. United States,* 271 U. S. 104, appellant requested a certain addition to an Instruction which the Court granted. There is no reason to believe that the Court would not have granted the reading of the statute and the regulation had it been requested in this case. Complaint was made of the Instruction as finally given in the *Boyd* case but was not made until the matter reached the Appellate Court. The Supreme Court commented that the Instruction appeared ambiguous (p. 107). The Court finally ruled:

> "We are justified in assuming that had the Court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly after permitting it to pass as satisfactory then the defendant is not now in a position to object to it."

This Court has held that objections to Instructions cannot be considered the first time on appeal. See *Yenkaichi Ito v. United States,* 64 F. (2d) 73 (C. C. A. 9, 1933), wherein it is said:

> "[9] Appellant seeks to have us consider other objections to the charge which he is urging for the first time on appeal. In the trial court no objection was made to the instructions on the grounds now urged and no exception reserved so these matters are not properly before us for review."

See, also, *Traversi v. United States,* 288 Fed. 375 (C. C. A. 9, 1923), wherein it was said:

> "[2] If it be conceded that the instructions might very properly have been more guarded in the respects now suggested, they were not plainly misleading, and not only did counsel for the plaintiff in error fail to object, but, upon inquiry of the court whether he desired anything further, he answered no. Not being convinced that an injustice has been done, we would not be warranted in sending the cause back for a new trial, for imperfections in instructions with which the parties were satisfied at the time they were given."

To like effect see, *Paddy v. United States,* 143 F. (2d) 847 (C. C. A. 9, 1944); *Kendall v. United States,* 131 F. (2d) 431 (C. C. A. 5, 1942).

Title 28, U. S. C. 391:

> "*(Judicial Code, section 269, amended.) New trial; harmless error.* All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. 726; Mar. 3, 1911, c. 231, §269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.)"

Conclusion.

Appellee respectfully submits that there are no authorities which hold that an Instruction in the form given in this case is not an Instruction of law and that on a review of the whole Record it must appear that substantial justice was done in the Trial Court.

The Appellee respectfully urges that this Honorable Court grant this Petition for Rehearing and that the Judgment of Conviction of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

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Attorneys for Appellee.

Certificate of Counsel.

We, counsel for the United States of America, Appellee in the above entitled cause, do hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and is not interposed for delay.

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